

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF NEW YORK

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OAK FOREST PRODUCTS, INC., ) 08-CV-6531(L)  
5 Plaintiff )  
6 vs. )  
HOME DEPOT USA, INC., et al., ) Rochester, New York  
7 Defendants. ) August 4, 2011  
8 ) 3:55 p.m.  
- - - - -X

9  
10 TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HONORABLE MARIAN W. PAYSON  
12 UNITED STATES MAGISTRATE JUDGE  
13  
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17 AUDIO RECORDER: Catherine A. Marr  
18  
19

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24 (Proceedings recorded by electronic sound recording, transcript  
25 produced by computer).

A P P E A R A N C E S

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- and -

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P R O C E E D I N G S

\* \* \*

THE CLERK: All rise. Oak Forest Products vs.  
Home Depot, 08-CV-6531.

MAGISTRATE JUDGE PAYSON: All right, the first order of  
business is to address the motions to withdraw as counsel which  
have been filed by Hiscock & Barclay in this matter.

Mr. Mackey has filed a motion accompanied by an  
affidavit. There has been no formal opposition that has been  
filed to that motion and, indeed, Mr. Herman has indicated that he  
has been retained by Oak Forest Products, the plaintiff, to  
represent it in this matter assisted by local counsel, as I  
understand it, Robert Scalione, Cellino & Barnes.

And Mr. Herman has filed a motion to appear *pro hac vice*  
in this matter, which I have reviewed, and all of the paperwork  
seems to be in order. So unless there is anything that anybody  
wants to say with respect to those motions, I'm prepared to decide  
them.

MR. MACKEY: The only request, Your Honor, is that the  
order note our charging lien pursuant to our retainer agreement  
which is attached to our moving papers.

MR. HERMAN: I couldn't hear that, Your Honor.

MAGISTRATE JUDGE PAYSON: Mr. Mackey, speak into the  
microphone instead of standing; or you can stand at the podium.

MR. MACKEY: Your Honor, the only additional request

1 would be that the order note our charging lien as noted in our  
2 retainer agreement, which is attached to our moving papers. Can't  
3 be a determined amount at this time, but I would like the order to  
4 note that.

5 MR. HERMAN: I'm just not sure what that means in terms  
6 of noting it. I mean, look, what does that mean by noting it?

7 MR. MACKEY: There is one.

8 MR. HERMAN: No, I think that has to be determined by the  
9 Court at a later date.

10 MR. MACKEY: I agree with you the amount that it is,  
11 but --

12 MR. HERMAN: No, I think whether you actually have a  
13 charging lien or not.

14 MAGISTRATE JUDGE PAYSON: Mr. Herman, how about we let  
15 Mr. Mackey talk, and then when I'm ready to hear from you, I'll  
16 indicate that I'm ready to hear from you, okay?

17 MR. HERMAN: Okay.

18 MAGISTRATE JUDGE PAYSON: All right, go ahead.

19 MR. MACKEY: Your Honor, I think we've articulated our  
20 retainer agreement, which was signed by the plaintiff, indicates  
21 that we're entitled to be paid reasonable fees in a contingency  
22 case based upon the -- all the circumstances once the case is  
23 ultimately determined.

24 MAGISTRATE JUDGE PAYSON: All right. Have you submitted  
25 a proposed order?

1 MR. MACKEY: I have not, Your Honor.

2 MAGISTRATE JUDGE PAYSON: Okay. So I was not prepared to  
3 address that issue, nor to address any objection to language in a  
4 proposed order. Why don't you circulate a proposed order?

5 And, Mr. Herman, any objections that you want to make to  
6 the language, you can send me a letter and indicate your  
7 objections and I'll consider that.

8 I don't generally include language in orders granting  
9 permission to withdraw any language in there about charging liens,  
10 but I'll consider that request.

11 MR. MACKEY: Thank you, Your Honor.

12 MAGISTRATE JUDGE PAYSON: All right. Anybody want to  
13 address the motion made by Mr. Herman to appear *pro hac vice*? I  
14 assume no? No? Okay. That application is granted, and I've  
15 signed the order admitting Mr. Herman *pro hac vice* in this matter.

16 MR. HERMAN: Thank you, Your Honor.

17 MAGISTRATE JUDGE PAYSON: Mr. Mackey, I guess you're free  
18 to go now.

19 MR. MACKEY: Thank you, Your Honor.

20 MAGISTRATE JUDGE PAYSON: All right, thank you.

21 The record should reflect that prior to taking the bench  
22 I met in chambers with counsel and then left them alone for a few  
23 minutes with the charge that they confer and determine if they  
24 could agree upon a proposed amended scheduling order.

25 I have been advised that they had a cooperative

1 discussion, but -- a productive discussion, but ultimately were  
2 not able to agree on, I think, the amount of time to be afforded  
3 for the various stages that remain in this litigation.

4 Am I right that both parties agree that there needs to  
5 be some extension of the discovery deadline?

6 MR. PAPASTRAVROS: Yes, Your Honor.

7 MAGISTRATE JUDGE PAYSON: Okay. All right, Mr. Herman,  
8 let me begin with you. Let's address first the issue of fact  
9 discovery. How much time are you asking for?

10 MR. HERMAN: Okay. I would ask, Judge, pushing out all  
11 of the dates in the trial order, which I don't have before me and  
12 I apologize, but Mr. -- but counsel has, you know, filled me in as  
13 to generally what those are and I tried to write them down here as  
14 quick as I could.

15 But my proposal would be somewhere between six to eight  
16 months beginning from the September 30th date because of my -- I  
17 think I filled you in, if I need to fill you in again what my  
18 problem is up to September 30th I will, but I'm pretty much  
19 out-of-pocket up until September 30th. So I figured six to eight  
20 months from there would probably do it.

21 I explained to counsel that I also have a special set  
22 trial beginning on December 5th; and I am also on a docket -- if  
23 you're a trial lawyer on docket, I understand that. What concerns  
24 me a little bit are the special set that could come and cause a  
25 clog in the discovery process in this case.

1           I'm -- again, I was just going to say I'm on a docket  
2 between September 12th and November 18th; and just yesterday my  
3 continuance was denied in that case by the judge and so,  
4 therefore, as soon as I get back from the September 30th date from  
5 New York, I suspect that I'll probably have another trial in  
6 October.

7           Having said that, again, I understand trial lawyers have  
8 trials, but we also understand what it takes to get ready for  
9 those trials. And in fairness to my client, I would at least need  
10 somewhere between six to eight months to get up to speed with  
11 this.

12           I told counsel that I wouldn't really be able to even  
13 look at this to start any even written discovery or attempt to do  
14 any oral discovery before September 30th. There are other people  
15 in my law firm that I could ask for help, but they're not even  
16 going to be getting the gist of this case until I get to look at  
17 it. So everything, in my view, in my view, begins September 30th.

18           And so a six to eight month time period doesn't seem  
19 like it's -- I realize the case has been around a little bit. But  
20 by the same token, counsel just got in in March himself.

21           There hasn't been a lot going on; I notice on the docket  
22 today that there's only 48 entries in this case. Not that I want  
23 to clutter it with more, but at the end of the day, the way I view  
24 what I know about this case, what I know about the witnesses and  
25 potential discovery that's out there, and with the different -- we

1 got a few different attorneys involved across the country and  
2 witnesses across the country, in coordinating those it's  
3 difficult.

4           Then you throw in the fact that, you know, down in  
5 December and January; a lot of things don't get done just because  
6 of holidays. And so I'm just trying to look at this in the most  
7 reasonable so I don't cut myself off and prejudice --

8           MAGISTRATE JUDGE PAYSON: Okay, I think I understand your  
9 request. I am concerned that my first scheduling order issued in  
10 April of 2009. That was over two years ago.

11           I agree with you with regard to the relative few docket  
12 entries during that period of time, a number of which relate to  
13 the issuance of amended scheduling orders.

14           I'm not sure that that factor is one that necessarily  
15 counsel's in favor of a long extension. What it suggests to me is  
16 that there's been plenty of time that's been afforded to this  
17 litigation and counsel certainly has had ample time to get this  
18 case up and running.

19           So let me hear from you, Mr. Papastravros.

20           MR. PAPASTRAVROS: Thank you, Your Honor, I appreciate  
21 that. First, I would -- where we left off on negotiations is to  
22 advise Your Honor that I'm prepared to assent to the motion that  
23 is before the Court with respect to a 90 day extension of  
24 discovery. That's what I think is appropriate in this case.

25           As Your Honor pointed out, the case is three years old.



1 There have been multiple extensions thus far.

2 MAGISTRATE JUDGE PAYSON: I wasn't sure whether to read  
3 the motion as a motion for a 90 day extension of the scheduling  
4 order for discovery once counsel had been retained, or whether the  
5 request was to afford Oak Forest Products 90 days in order to  
6 retain counsel, at which point we would address the issue of a  
7 schedule.

8 MR. PAPASTRAVROS: I think that that --

9 MAGISTRATE JUDGE PAYSON: Movant's request this Court  
10 extend the deadlines by this Court's scheduling order of March 8th  
11 90 days to permit counsel to retain alternate counsel.

12 So I think Mr. Mackey was obviously trying to preserve  
13 his client's rights during that timeframe, and I think probably  
14 leave to new counsel the issue of how much time he or she sought.

15 So I don't read the motion as saying that if I were to  
16 grant the motion, it was conditioned on an agreement by the  
17 plaintiff to limit the request of any extension by 90 days, but I  
18 don't want to be hypertechnical.

19 I am, you know, I am concerned that the case has been  
20 pending for -- even following answers for over two years. And  
21 maybe, Mr. Papastravros, you're in a better motion than Mr. Herman  
22 to tell me what has happened during that two-year period.

23 MR. PAPASTRAVROS: Sure. Well, I entered about six  
24 months ago, so I'm not too well positioned to talk about what  
25 happened prior to that.

1           However, what's happened in the last six months since we  
2 were before Your Honor in a scheduling conference in March is that  
3 Mr. Mackey and I engaged in settlement discussions right after  
4 that conference in March -- March and April, beginning of May. It  
5 became clear that it wasn't going to work.

6           And at which point in time we sent a letter in May  
7 asking for Oak Forest to remedy the deficiencies in its document  
8 production. We sent out requests for admissions and we sent out  
9 four deposition notices.

10           MAGISTRATE JUDGE PAYSON: Okay.

11           MR. PAPASTRAVROS: When Jerry filed his -- it essentially  
12 ground to a halt in the middle of June when Jerry filed his --

13           MAGISTRATE JUDGE PAYSON: How much discovery has taken  
14 place before the -- I think there was an unsuccessful mediation,  
15 and I don't know if that preceded your involvement or --

16           MR. PAPASTRAVROS: It did.

17           MAGISTRATE JUDGE PAYSON: Okay. So there was a  
18 mediation, that was not successful; you got involved in the case,  
19 settlement negotiations began anew and were not successful.

20           Has there been any discovery or has it just been fits  
21 and starts of settlement negotiations?

22           MR. PAPASTRAVROS: Multiple sets of document requests and  
23 interrogatories on both sides and document production has been  
24 made. We don't believe it's totally complete, but it has been  
25 made initially on both sides of the equation.

1 MAGISTRATE JUDGE PAYSON: All right.

2 MR. HERMAN: Judge --

3 MR. PAPASTRAVROS: There have not been depositions taken  
4 yet. Judging from the initial disclosures, Your Honor, there's a  
5 handful of witnesses on both sides of the equations. These  
6 are small -- King of Fans and Oak Forest are not large companies.  
7 Oak Forest is a start-up. There's Mr. Cartwright, Mr. Lye, and  
8 Mr. Cartwright's wife really is the three witnesses on that side.

9 MAGISTRATE JUDGE PAYSON: From your perspective, the  
10 remaining discovery really centers on depositions?

11 MR. PAPASTRAVROS: Yes.

12 MAGISTRATE JUDGE PAYSON: Okay.

13 MR. PAPASTRAVROS: In response -- sort of following up on  
14 my outstanding requests to written discovery, and then there's --  
15 under Your Honor's scheduling order, expert discovery follows  
16 that.

17 MAGISTRATE JUDGE PAYSON: All right. Mr. Herman, you had  
18 wanted to say something?

19 MR. HERMAN: Yes, ma'am. First of all, there hasn't been  
20 one deposition taken in the case. The plaintiff's deposition  
21 hasn't even been taken, and it has just been noticed and it's  
22 noticed, by the way, for August 17th.

23 I don't know why -- I don't have an answer to your  
24 question with regard to what happened in this case for the first  
25 three years, but I would have suspected that some depositions

1 would have been -- would have taken place. I don't know the  
2 answer to that.

3 I understand that there was some written discovery that  
4 went back and forth, but from what I -- I don't even have a file  
5 on this so I'm kind of talking from the seat of my pants here, but  
6 at the end of the day, in talking with my client, there are a  
7 number of witnesses that we need to depose from this side. I  
8 would say my estimate is somewhere between seven and ten.

9 And then there's also written discovery from our side as  
10 counsel had sent over some discovery; we have some to send to him.

11 So, you know, I don't think it was any fault of my  
12 client's -- and I don't know this, but I don't think Mr. Mackey  
13 would even say this -- that there's any fault on my client's part  
14 in this delay.

15 And, of course, if the idea is that it's going to be a  
16 short period of time to get really fully discovered -- this case  
17 fully discovered, it does prejudice my client, and I respectfully  
18 don't see the prejudice on the part of the defendants --

19 MAGISTRATE JUDGE PAYSON: Okay, thank you. I am prepared  
20 to extend fact discovery until the end of January, and I will  
21 extend all the other deadlines by the same timeframes that were  
22 set forth in the original scheduling order.

23 I don't have a 2012 calender so I can't give you those  
24 dates. That is a five month extension from the end of August,  
25 which I think if I am reading the docket right, is the operable --

1 the current fact discovery deadline, not the end of September.

2 So I understand that there is a fair amount of work to  
3 be done, but I think work that can reasonably be accomplished  
4 within that timeframe.

5 I might afford a longer deadline if we were starting  
6 from scratch, but we're not. And I think five months is adequate  
7 for what has been outlined, so I'll extend the fact discovery  
8 until the end of January.

9 I think plaintiff's experts were to be identified within  
10 a three or four week period thereafter, and then further  
11 discovery -- expert discovery and summary judgment motions to  
12 follow. So I will extend all those deadlines as well.

13 Okay, I will issue a -- I guess it will be a fourth  
14 amended scheduling order, and it will be filed electronically.

15 MR. PAPASTRAVROS: Your Honor, could I make one request?  
16 In the third amended scheduling order, I think in prior scheduling  
17 orders as well, motions to compel actually pre-dated the discovery  
18 deadline by a month.

19 I think it's easier for -- I dealt with this when we  
20 were coming up on this deadline. I think it might be easier if  
21 the motion to compel deadline could be the same --

22 MAGISTRATE JUDGE PAYSON: All right, that's fine.

23 MR. PAPASTRAVROS: -- as the fact discovery deadline.

24 MAGISTRATE JUDGE PAYSON: That's fine, I'll do that.

25 MR. HERMAN: Thank you.

1           MAGISTRATE JUDGE PAYSON: Okay. Take a look at the  
2 schedule when it's filed electronically. It will have another  
3 date built-in for a further status conference, but I just don't  
4 have my calender up right now. It will be sometime in January.

5           So I'll set a date for a further status conference  
6 sometime in January. If you want to participate by phone, that's  
7 probably fine; just send me a letter request ahead of time asking  
8 that you'd like to participate by phone.

9           And if you have disputes between now and then and you  
10 want to try to resolve them informally, let me know, I'm certainly  
11 happy to try to do that, okay?

12          MR. HERMAN: Okay.

13          MAGISTRATE JUDGE PAYSON: So in case the record is not  
14 clear, I am granting the motion to withdraw.

15          I'm granting the motion for *pro hac vice*.

16          And I will issue an amended scheduling -- a fourth  
17 amended scheduling order as I have outlined.

18          Anything else?

19          MR. HERMAN: No, Your Honor, not from this end.

20          MAGISTRATE JUDGE PAYSON: Okay, thanks very much.

21          MR. PAPASTRAVROS: Thank you, Your Honor.

22          MR. HERMAN: Thank you very much.

23          MAGISTRATE JUDGE PAYSON: Okay.

24          (WHEREUPON, the proceedings adjourned at 4:12 p.m.)

25                                           \*    \*    \*

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript to the best of my ability from the official electronic sound recording of the proceedings in the above-entitled matter.

S/ Christi A. Macri

Christi A. Macri, FAPR-RMR-CRR-CRI